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APPEALS CHAMBER

The Prosecutor v. Milorad Krnojelac - Case no. IT-97-25-A

Judges Jorda [Presiding], Schomburg, Shahabuddeen, Güney and Agius

“JUDGEMENT”

17 SEPTEMBER 2003

Joint criminal enterprise – Scope of the common state of mind and the required additional agreement – Systemic form of joint criminal enterprise – Intent to participate in a systemic joint criminal enterprise – Distinction between intent and motive – Joint criminal enterprise and the common purpose – Form of the indictment – Joint criminal enterprise and the specificity of the indictment – Mens rea of superior responsibility – Persecution and discriminatory intent – Persecution and discrimination in fact – Forced labour and the involuntary nature of the work – Persecution by way of deportation and expulsion – Acts of forced displacement and persecution – Lack of genuine choice and the unlawfulness of displacement – Sentence – Effects on the victims’ relatives and the gravity of the crime.

Scope of the common state of mind and the required additional agreement: apart from the specific case of the extended form of joint criminal enterprise, the very concept of joint criminal enterprise presupposes that its participants, other than the principal perpetrator(s) of the crimes committed, share the perpetrators’ joint criminal intent.

Systemic form of joint criminal enterprise: the systemic form of joint criminal enterprise may be applied to the serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.

Intent to participate in a systemic joint criminal enterprise: in assessing intent to participate in a systemic form of joint criminal enterprise, it need not be proved that there was an agreement to commit each of the crimes in furtherance of the common purpose.

Distinction between intent and motive: the distinction between intent and motive must be applied in the case of all the crimes set out in the Statute.

Joint criminal enterprise and the common purpose: the use of the concept of joint criminal enterprise to define an individual’s responsibility for crimes physically committed by others requires a strict definition of common purpose. This principle applies irrespective of the category of joint enterprise alleged. The principal perpetrators of the crimes constituting the common purpose or constituting a foreseeable consequence of it should also be identified as precisely as possible.

Joint criminal enterprise and the specificity of the indictment: it is preferable for an indictment alleging the accused’s responsibility as a participant in a joint criminal enterprise also to refer to the particular form (basic or extended) of joint criminal enterprise envisaged.

Mens rea of superior responsibility: the *Celebici* case-law only indicates that, with regard to a specific offence (torture for example), the information available to the superior need not contain specific details on the unlawful acts which have been or are about to be committed. It may not be inferred from this case-law that, where one offence (the “first offence”) has a material element in common with another (the “second offence”) but the second offence contains an additional element not present in the first, it suffices that the superior has alarming information regarding the first offence in order to be held responsible for the second on the basis of Article 7(3) of the Statute (such as for example, in the case of offences of cruel treatment and torture where torture subsumes the lesser offence of cruel treatment). Such an inference is not admissible with regard to the principles governing individual criminal responsibility.

Persecution and discriminatory intent: the discriminatory intent behind the beatings committed may not be inferred directly from the general discriminatory nature of an attack characterised as a crime against humanity. It may be inferred from such a context as long as, in view of the facts of the case, circumstances surrounding the commission of the alleged acts substantiate the existence of such intent.

Persecution and discrimination in fact: a Serb mistaken for a Muslim may still be the victim of the crime of persecution. The act committed against him institutes discrimination in fact, vis-à-vis the other Serbs who were not subject to such acts, effected with the will to discriminate against a group on grounds of ethnicity.

Forced labour and the involuntary nature of the work: the argument that evidence which establishes the victim’s subjective state of mind and relates to the facts indicating that he was forced to work is clearly relevant and may of itself be sufficient to establish lack of consent must be rejected. Such an opinion is not sufficient to establish forced labour and the detainees’ personal conviction that they were forced to work must be proven with objective and not just subjective evidence.

Acts of forced displacement and persecution: the acts of forcible displacement underlying the crime of persecution punishable under Article 5(h) of the Statute are not limited to displacements across a national border.

Lack of genuine choice and the unlawfulness of displacement: it is the absence of genuine choice that makes displacement unlawful. It is impossible to infer genuine choice from the fact that consent was expressed, given that the circumstances may deprive the consent of any value.

Effects on the victims’ relatives and the gravity of the crime: the case-law of some domestic courts shows that a Trial Chamber may take into account the impact of a crime on a victim’s relatives when determining the appropriate punishment.

Background

● In the Indictment of 25 June 2001, Milorad Krnojelac (“Krnojelac”) was charged with twelve counts of crimes against humanity and violations of the laws or customs of war. As commander of the Foca Kazneno-Popravni Dom (“KP Dom”) from April 1992 to August 1993, Krnojelac was charged under Articles 7(1) and 7(3) of the Statute with acting together and in common purpose with the KP Dom guards in order to persecute

Muslim and other non-Serb civilian detainees on political, racial or religious grounds, commit acts of torture, beatings and murder, and illegally detain non-Serb civilians.

● The Trial commenced on 30 October 2000. The Prosecution and Defence presented their closing arguments on 19 and 20 July 2001. During the 76 days of trial, 45 prosecution witnesses and 31 defence witnesses testified and 283 prosecution exhibits and 279 defence exhibits were tendered. In its Judgment of 15 March

2002, Trial Chamber II, presided over by Judge Hunt, found Krnojelac individually responsible as an aider and abettor under Article 7(1) of the Statute for the crime of persecution (based on imprisonment, living conditions and beatings) as a crime against humanity (Count 1) and the crime of cruel treatment (based on living conditions) as a violation of the laws or customs of war (Count 15). Under Article 7(3) of the Statute, Krnojelac was also held responsible for the crimes of persecution as a crime against humanity (based on beatings - Count 1), inhumane acts as a crime against humanity (based on beatings - Count 5) and cruel treatment as a violation of the laws or customs of war (based on beatings - Count 7). He was acquitted by the Trial Chamber on the counts of torture, murder under Article 3, murder under Article 5, imprisonment and other inhumane acts and handed down a single sentence of seven-and-a-half years' imprisonment.¹

- On 12 April 2002, Krnojelac appealed against those convictions and raised six grounds in support of his appeal. Krnojelac maintained that the Trial Chamber had erred in fact by misevaluating his position as prison warden. In his view, the Trial Chamber had committed an error of law in holding that he had aided and abetted persecution (imprisonment and living conditions). He contended that the Trial Chamber had committed an error of fact in finding that he had aided and abetted cruel treatment (living conditions). It was further claimed that the Trial Chamber had erred in fact by ruling that Krnojelac was responsible as a superior for persecution (beatings). Lastly, the Trial Chamber allegedly erred in fact in finding that Krnojelac was responsible as a superior for inhumane acts and cruel treatment (beatings).

- On 15 April 2002, the Prosecution filed its notice of appeal alleging errors of law and fact committed by the Trial Chamber. The Prosecution presented seven grounds in support of its appeal. In its first ground of appeal, the Prosecution asserted that the Trial Chamber had erred in law in articulating its definition of joint criminal enterprise liability and in applying that definition to the facts of the case. Secondly, it was claimed that the Trial Chamber had committed an error of law when it required that the Indictment refer to an "extended form" of joint criminal enterprise. The Prosecution's third ground of appeal argued that the Trial Chamber had erred in fact in finding that Krnojelac neither knew nor had reason to know that his subordinates were torturing the detainees and, accordingly, concluding that he could not be held responsible pursuant to Article 7(3) of the Statute. Fourthly, the Trial Chamber committed an error of fact in finding that, for the purposes of Article 7(3) of the Statute, the information available to Krnojelac was insufficient to put him on notice that his subordinates were involved in the murder of detainees at the KP Dom. Fifthly, the Trial Chamber made a factual error in finding that the beatings constituting inhumane acts and cruel treatment were not inflicted on discriminatory grounds and that therefore Krnojelac could not be held responsible for persecution as a superior. Sixthly, the Trial Chamber erred by acquitting Krnojelac on the count of persecution based on forced labour. Lastly, according to the Prosecution, the Trial Chamber erred in acquitting Krnojelac on the count of persecution based on deportation and expulsion.

- The two appellants also filed for leave to appeal against the seven and a half year sentence passed down by the Trial Chamber.

Judgement

The Appeals Chamber allowed the Prosecution's first ground of appeal and set aside Krnojelac's convictions as an aider and abettor to persecution (crime against humanity for imprisonment and inhumane acts) and cruel treatment (violation of the laws or customs of war for the living conditions imposed) under Counts 1 and 15 of the Indictment pursuant to Article 7(1) of the Statute. It allowed the Prosecution's third ground of appeal and reversed Krnojelac's acquittal on Counts 2 and 4 of the Indictment (torture as a crime against humanity and a violation of the laws or customs

of war) pursuant to Article 7(3) of the Statute. It allowed the Prosecution's fourth ground of appeal and reversed Krnojelac's acquittal on Counts 8 and 10 of the Indictment (murder as a crime against humanity and murder as a violation of the laws or customs of war) pursuant to Article 7(3) of the Statute. It allowed the Prosecution's fifth ground of appeal seeking revision of Krnojelac's conviction under Count 1 of the Indictment (persecution as a crime against humanity) pursuant to Article 7(3) of the Statute so that it encompassed a number of beatings. It allowed the Prosecution's sixth ground of appeal and reversed Krnojelac's acquittal on Count 1 of the Indictment (persecution as a crime against humanity) based on the forced labour imposed upon the non-Serb detainees. It allowed the Prosecution's seventh ground of appeal and reversed Krnojelac's acquittal on Count 1 of the Indictment (persecution as a crime against humanity) based on the deportation and expulsion of non-Serb detainees. It dismissed the Prosecution's second ground of appeal on the form of the Indictment and all of Krnojelac's grounds of appeal.

The Appeals Chamber found Krnojelac guilty of Counts 1 and 15 of the Indictment as a co-perpetrator of persecution, a crime against humanity (imprisonment and inhumane acts), and of cruel treatment, a violation of the laws or customs of war (living conditions), pursuant to Article 7(1) of the Statute. It found Krnojelac guilty of Counts 2 and 4 of the Indictment (torture as a crime against humanity and a violation of the laws or customs of war) pursuant to Article 7(3) of the Statute. It found Krnojelac guilty of Counts 8 and 10 of the Indictment (murder as a crime against humanity and murder as a violation of the laws or customs of war) pursuant to Article 7(3) of the Statute. It revised Krnojelac's conviction under Count 1 of the Indictment (persecution as a crime against humanity) pursuant to Article 7(3) so that it encompassed new beatings. It found Krnojelac guilty of Count 1 of the Indictment as a co-perpetrator of the crime against humanity of persecution (forced labour, deportation and expulsion) pursuant to Article 7(1) of the Statute. It set aside all the convictions entered under Count 5 of the Indictment (inhumane acts as a crime against humanity) pursuant to Article 7(3) of the Statute and the convictions entered under Count 7 of the Indictment (cruel treatment as a violation of the laws or customs of war) pursuant to Article 7(3) of the Statute for certain facts.

The Appeals Chamber dismissed the sentencing appeals entered by Krnojelac and the Prosecution (with the exception of the sub-ground allowed in paragraph 262 of the Judgement)² and imposed a new sentence, taking account of Krnojelac's responsibility established on the basis of the new convictions on appeal and in the exercise of its discretion. It thus sentenced Krnojelac to 15 years' imprisonment.³

Reasoning⁴

Definition of the constituent elements of participation in a joint criminal enterprise

In its first ground of appeal, the Prosecution alleged errors of law in the Trial Chamber's definition of the constituent elements of participation in a joint criminal enterprise and in the application of that definition to the facts of the case. In addressing this ground of appeal, the Appeals Chamber elaborated on the following points:

² The Trial Chamber considered "the extent to which [Counsel for Krnojelac] co-operated with it and with the Prosecution" as a factor contributing to "the efficient conduct of the trial" (para. 520 of the Trial Judgement). It found this to be a mitigating factor warranting a reduced sentence. The Appeals Chamber took note of the error and allowed the Prosecution's ground of appeal. It stated that "the conduct described in that paragraph of the impugned Judgment is how any counsel should ordinarily behave before a Trial Chamber" and affirmed that the conduct of an accused's counsel could not be taken into consideration when determining sentence (Appeals Judgement, para. 262).

³ Fifteen years as of the pronouncement of the appeals judgement, subject to credit being given under Rule 101(C) of the Rules for the period Krnojelac has already spent in detention, that is from 15 June 1998 to 17 September 2003.

⁴ This summary will discuss only the contributions essential to the Tribunal's case-law and the Appeals Judgement's contributions to international criminal and humanitarian law. The full text and the summary Appeals Judgement may be obtained from the Tribunal's Public Information Service and/or its Internet site at the following address: www.un.org/icty ("Judgements" page).

¹ *Krnojelac*, IT-97-25-T, Judgment ("Trial Judgment"), 15 March 2002, *Judicial Supplement No. 31 bis*.



Participation in a joint criminal enterprise as “commission”

In addition to clarifying the linguistic problems arising out of the English term *accomplice* and its French equivalent (*coauteur* or *complice*),⁵ the Appeals Chamber examined whether the Trial Chamber had committed an error of law in deciding that the notion of “commission” within the meaning of Article 7(1) of the Statute must be reserved for the principal perpetrator of the crime. In paragraph 73 of the Judgment, the Trial Chamber had held that the term “committed” did not apply to a participant in a joint criminal enterprise who had not personally and physically committed the crime.

The Appeals Chamber noted that paragraph 188 of the *Tadic* Appeals Judgement⁶ had already set out that the commission of one of the crimes envisaged in the Statute could also occur through participation in the realisation of a common purpose. It further upheld the case-law established by the *Ojdanic* Decision in which the Appeals Chamber had found that “insofar as a participant shares the purpose of the joint criminal enterprise (as he or she must do) as opposed to merely knowing about it, he or she cannot be regarded as a mere aider and abettor to the crime which is contemplated.”⁷

Scope of the common state of mind and the required additional agreement

The Prosecution contended that the Trial Chamber committed an error of law in paragraph 83 when it held that, in order to establish the basic form of joint criminal enterprise,⁸ the Prosecution must demonstrate that “each of the persons charged and (if not one of those charged) the principal offender or offenders had a common state of mind, that which is required for that crime”. It argued that such an approach could render the notion of joint criminal enterprise redundant in the context of State criminality. By way of illustration, the Prosecution used the example of high-level political and military leaders who, from a distant location, plan the widespread destruction of civilian buildings (hospitals and schools) in a particular area in order to demoralise the enemy without the soldiers responsible for carrying out the attacks sharing the objective in question or even knowing the nature of the relevant targets.

The Appeals Chamber rejected the Prosecution’s argument and found that “apart from the specific case of the extended form of joint criminal enterprise, the very concept of joint criminal enterprise presupposes that its participants, other than the principal perpetrator(s) of the crimes committed, share the perpetrators’ joint criminal intent”.⁹

Systemic form of joint criminal enterprise

The Prosecution alleged that the Trial Chamber had erred in law by partitioning the different types of crimes making up the joint criminal enterprise which it considered formed part of a system.

The Appeals Chamber confirmed that the Prosecution could have relied on the systemic form of joint criminal enterprise but noted that the Prosecution did not do so clearly in the Indictment. For the first time ever, the Chamber ruled that this form of joint criminal enterprise could be applied to the crimes tried by the Tribunal: the systemic form of joint criminal enterprise “may be applied to [...] the serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991”.¹⁰

⁵ Appeals Judgement, paras. 67-72.

⁶ *Tadic*, IT-94-1-A, Appeals Judgement (“*Tadic* Appeals Judgement”), 15 July 1999, para. 220, *Judicial Supplement* No. 6.

⁷ *Milutinovic et al.*, IT-99-37-AR72, Decision on Dragoljub Ojdanic’s Motion Challenging Jurisdiction – Joint Criminal Enterprise (“*Ojdanic* Decision”), 21 May 2003, para. 20, *Judicial Supplement* No. 41.

⁸ See box entitled “Forms of Joint Criminal Enterprise”.

⁹ Appeals Judgement, para. 84.

¹⁰ *Ibid.*, para. 89. The Appeals Chamber went on to state that, according to the *Tadic* Appeals Judgement, an individual did not have to be part of the organised system in order to be considered a participant in the joint criminal enterprise and that this category of cases - a variant of the first - is characterised by the “existence of an organised system set in place to achieve a common

The Appeals Chamber stated that the Trial Chamber had only followed the approach taken by the Prosecution, which had pleaded the common purpose theory (basic form of joint criminal enterprise) in the Indictment. It held that the Trial Chamber had been justified in seeking out the intent of the crime’s principal perpetrators.¹¹

Intent to participate in a systemic joint criminal enterprise

The Appeals Chamber bore out the Prosecution’s contention that the Trial Chamber had required proof of an agreement between Krnojelac and the principal offenders, even though the crimes formed part of a system (crimes charged under Counts 1 and 15). It considered that “by requiring proof of an agreement in relation to each of the crimes committed with a common purpose, when it assessed the intent to participate in a systemic form of joint criminal enterprise, the Trial Chamber went beyond the criterion set by the Appeals Chamber in the *Tadic* case”.¹² It took the view that when the Trial Chamber determined that the system in place at the KP Dom sought to subject non-Serb detainees to inhumane living conditions and ill-treatment on discriminatory grounds, it should have examined whether or not Krnojelac knew of the system and agreed to it, without it being necessary to establish that he had entered into an agreement with the principal perpetrators to commit the crimes.

The Appeals Chamber found that the error made by the Trial Chamber resulted in Krnojelac’s liability being erroneously characterised. Consequently, Krnojelac became liable not as an aider and abettor to the relevant crimes but a co-perpetrator.¹³

In its analysis, the Appeals Chamber was also careful to set out the distinction between intent and motive.

Distinction between intent and motive and the crimes laid down in the Statute

The Appeals Chamber noted that customary international law does not require a purely personal motive in order to establish the existence of a crime against humanity.¹⁴ The Appeals Chamber went on to recapitulate its case-law in the *Jeliscic* case which, with regard to the specific intent required for the crime of genocide, sets out “the necessity to distinguish specific intent from motive. The personal motive of the perpetrator of the crime of genocide may be, for example, to obtain personal economic benefits, or political advantage or some form of power. The existence of a personal motive does not preclude the perpetrator from also having the specific intent to commit genocide”.¹⁵ The Appeals Chamber stated that “this distinction between intent and motive must also be applied to the other crimes laid down in the Statute”.¹⁶

Joint criminal enterprise and common purpose

The Appeals Chamber pointed out, first of all, that it is for the Prosecution to determine the legal theory which it considers most appropriate to demonstrate that the facts it intends to submit to the Trial Chamber for assessment enable the responsibility of the person charged to be established. Likewise, it observed that the Prosecution may, to that end, additionally or alternatively rely on one or more legal theories, on condition that it is done clearly, early enough and, in any event, allowing enough time to enable

criminal purpose”. As for the required intent, it stated that it must be proved that the Accused had “personal knowledge of the system in question (whether proven by express testimony or a matter of reasonable inference from the Accused’s position of authority) and the intent to further the concerted system”.

¹¹ See box entitled “Basic Form of Joint Criminal Enterprise v. Systemic Form: the Prosecution’s Burden of Proof”.

¹² Appeals Judgement, para. 97.

¹³ *Ibid.*, para. 113.

¹⁴ *Tadic* Appeals Judgement, para. 270.

¹⁵ *Jeliscic*, IT-95-10-A, Appeals Judgement (“*Jeliscic* Appeals Judgement”), 5 July 2001, para. 49, *Judicial Supplement* No. 26. See also *Kunarac et al.*, IT-96-23 & IT-96-23/1-A, Appeals Judgement (“*Kunarac* Appeals Judgement”), 12 June 2002, para. 103 and 153, *Judicial Supplement* No. 34.

¹⁶ Appeals Judgement, para. 102.

the Accused to know what exactly he is accused of and to enable him to prepare his defence accordingly.¹⁷

In connection with common purpose, the Appeals Chamber held that the use of “the concept of joint criminal enterprise to define an individual’s responsibility for crimes physically committed by others requires a strict definition of common purpose”, that the principle “applies irrespective of the category of joint enterprise alleged”, and that “the principal perpetrators of the crimes constituting the common purpose (civilian and military authorities and/or guards and soldiers present at KP Dom) or constituting a foreseeable consequence of it should also be identified as precisely as possible”.¹⁸ In this way, the Accused may know whether or not the system he is charged with having contributed to involves all of the acts being prosecuted and, where applicable, also know upon what basis his responsibility is being incurred for the acts not embraced by the system or the participants’ common purpose.

Form of the Indictment

In its second ground of appeal, the Prosecution maintained that the Trial Chamber had committed an error when it found that the Accused could not be held liable under the third form of joint criminal enterprise with respect to the crimes alleged unless an “extended” form of joint criminal enterprise was pleaded expressly in the Indictment. The Prosecution did not ask for the Judgment to be revised on this point. The Appeals Chamber ruled on how precise an indictment must be and, in particular, how the Prosecution used the categories of joint criminal enterprise to prosecute the Accused because these issues were of general importance to the case-law of the Tribunal.

Joint criminal enterprise and the specificity of the Indictment

The Appeals Chamber summarised the applicable law which sets forth that the Prosecution must set out the crimes charged precisely, meaning that the Prosecution must set out “the material facts of the Prosecution case with enough detail to inform a defendant clearly of the charges against him so that he may prepare his defence”.¹⁹ On the issue of the nature of the liability incurred, the Appeals Chamber stated:

“it is vital for the indictment to specify at least on what legal basis of the Statute an individual is being charged (Article 7(1) and/or 7(3)). Since Article 7(1) allows for several forms of direct criminal responsibility, a failure to specify in the indictment which form or forms of liability the Prosecution is pleading gives rise to ambiguity. The Appeals Chamber considers that such ambiguity should be avoided and holds therefore that, where it arises, the Prosecution must identify precisely the form or forms of liability alleged for each count as soon as possible and, in any event, before the start of the trial. Likewise, when the Prosecution charges the ‘commission’ of one of the crimes under the Statute within the meaning of Article 7(1), it must specify whether the term is to be understood as meaning physical commission by the Accused or participation in a joint criminal enterprise, or both. The Appeals Chamber also considers that it is preferable for an indictment alleging the Accused’s responsibility as a participant in a joint criminal enterprise also to refer to the particular form (basic or extended) of joint criminal enterprise envisaged”.²⁰

The Appeals Chamber recognised that, in principle, the need for the Indictment to be specific does not prevent the Prosecution from pleading elsewhere than in the indictment - for instance in a pre-trial brief - the legal theory which it believes best

demonstrates that the crime or crimes alleged are imputable to the Accused in law in the light of the facts alleged. It did, however, state that this option is limited by the need to guarantee the accused a fair trial.²¹

Applying these principles to the case in point, the Appeals Chamber found that the Trial Chamber had not erred in refusing to apply the extended form of joint criminal enterprise to the crimes charged, since the Prosecution had persisted in ambiguously pleading the form of joint criminal enterprise it intended to use in order to prosecute the Accused.

Mens rea of superior responsibility

The Prosecution’s third and fourth grounds of appeal both invoked errors relating to the *mens rea* of superior responsibility under Article 7(3) of the Statute. The Prosecution submitted that the Trial Chamber had erred in fact by not concluding that, for the purposes of Article 7(3) of the Statute, Krnojelac “knew or had reason to know” that detainees were being tortured by his subordinates as opposed to being beaten arbitrarily (third ground of appeal) and that his subordinates were involved in the murder of the detainees listed in Schedule C of the Indictment (fourth ground of appeal). Although the Prosecution did not call into question the Trial Chamber’s interpretation of the “had reason to know” standard - merely its application to the facts of the case - the Appeals Chamber nonetheless stated its substance.

“Had to reason to know” standard

In the *Celebici* Appeals Judgement, the “had reason to know” standard is defined as follows:

“[a] showing that a superior had some general information in his possession, which would put him on notice of possible unlawful acts by his subordinates would be sufficient to prove that he ‘had reason to know’ [...] This information does not need to provide specific information about unlawful acts committed or about to be committed”.²²

The Appeals Chamber found that the Prosecution’s argument seemed to come down to accepting that, simply because of the beatings, of which Krnojelac was found to *have been aware* and which constituted cruel treatment and inhumane acts, it must be concluded that Krnojelac *had reason to know* that acts of torture and murders might be being committed (as knowledge of the beatings constitutes sufficient information to alert him to the risk of acts of torture and murders being committed) and that, since he did not open any investigation in order to ascertain whether such crimes had been or were about to be committed, Krnojelac had the requisite *mens rea* to incur liability pursuant to Article 7(3) of the Statute for torture and murders.

On this point, interpreting the *Celebici* Appeals Judgement, the Appeals Chamber stated as follows:

“[...] with regard to a specific offence (torture for example), the information available to the superior need not contain specific details on the unlawful acts which have been or are about to be committed. It may not be inferred from this case-law that, where one offence (the “first offence”) has a material element in common with another (the “second offence”) but the second offence contains an additional element not present in the first, it suffices that the superior has alarming information regarding the first offence in order to be held responsible for the second on the basis of Article 7(3) of the Statute (such as for example, in the case of offences of cruel treatment and torture where torture subsumes the lesser offence of cruel treatment)”.²³

¹⁷ *Ibid.*, para. 115.

¹⁸ Appeals Judgement, para.116.

¹⁹ *Ibid.*, para. 131.

²⁰ *Ibid.*, para. 138.

²¹ *Ibid.*

²² *Delalic et al.*, IT-96-21-A, Judgement (“*Celebici* Appeals Judgement”), 20 February 2001, para. 238, *Judicial Supplement* No. 23.

²³ Appeals Judgement, para. 155.

It went to hold that such “an inference is not admissible with regard to the principles governing individual criminal responsibility” and found that “it is not enough that an accused has sufficient information about beatings inflicted by his subordinates; he must also have information – albeit general – which alerts him to the risk of beatings being inflicted for one of the purposes provided for in the prohibition against torture”.²⁴

Persecution and discriminatory intent

In its fifth ground of appeal, the Prosecution submitted that the Trial Chamber had erred in concluding that the beatings constituting inhumane acts and cruel treatment inflicted by the guards on detainees at the KP Dom had not been committed on discriminatory grounds and that they did not therefore constitute persecution for which Krnojelac could incur responsibility as a superior under Article 7(3) of the Statute.

Persecution and discriminatory intent

The Appeals Chamber reiterated that, in law, persecution as a crime against humanity requires evidence of a specific intent to discriminate on political, racial or religious grounds and that it falls to the Prosecution to prove that the relevant acts were committed with the requisite discriminatory intent.

Whilst the Appeals Chamber rejected the idea that the discriminatory intent behind the beatings committed might be inferred directly from the general discriminatory nature of an attack characterised as a crime against humanity, it maintained that it “may be inferred from such a context as long as, in view of the facts of the case, circumstances surrounding the commission of the alleged acts substantiate the existence of such intent”.²⁵ Among such circumstances, it identified: “the operation of the prison (in particular, the systematic nature of the crimes committed against a racial or religious group) and the general attitude of the offence’s alleged perpetrator as seen through his behaviour”.²⁶

Persecution and discrimination in fact

The Appeals Chamber upheld the Trial Chamber’s definition of the crime of persecution:

[...] the crime of persecution consists of an act or omission which discriminates in fact and which: denies or infringes upon a fundamental right laid down in international customary or treaty law (the *actus reus*); and was carried out deliberately with the intention to discriminate on one of the listed grounds, specifically race, religion or politics (the *mens rea*).²⁷

However, the Appeals Chamber does not agree with the interpretation given to this definition in paragraph 432 of the Judgment, particularly in footnote 1293 which reads as follows:

“The crime of persecution, the only crime in the Statute which must be committed on discriminatory grounds (see *Tadic* Appeal Judgment, par 305), has as its object the protection of members of political, racial and religious groups from discrimination on the basis of belonging to one of these groups. If a Serb deliberately murders someone on the basis that he is Muslim, it is clear that the object of the crime of persecution in that instance is to provide protection from such discriminatory acts to members of the Muslim religious group. If it turns out that the victim is not Muslim, to argue that this act amounts nonetheless to persecution if done with a discriminatory intent needlessly extends the protection afforded by that crime to a person who is not a member of the listed group requiring protection in that instance (Muslims)”.

The Appeals Chamber found this assertion to be an erroneous interpretation of the requirement for discrimination in fact (or a discriminatory act) established by the case-law. Using the example provided in the footnote, the Appeals Chamber considered that a Serb mistaken for a Muslim may still be the victim of the crime of persecution. It held that “the act committed against him institutes discrimination in fact, *vis-à-vis* the other Serbs who were not subject to such acts, effected with the will to discriminate against a group on grounds of ethnicity”.²⁸

In directly addressing the Prosecution’s ground of appeal, the Appeals Chamber found that “the only reasonable finding that could be reached on the basis of the Trial Chamber’s relevant findings of fact was that the beatings were inflicted upon the non-Serb detainees because of their political or religious affiliation and that, consequently, these unlawful acts were committed with the requisite discriminatory intent”.²⁹ It therefore found Krnojelac guilty under Count 1 (persecution) of the Indictment pursuant to Article 7(3) of the Statute based on some of the beatings and consequently reversed his conviction under Count 5 of the Indictment based on the same facts.³⁰

Forced labour and the involuntary nature of the work

In its sixth ground of appeal, the Prosecution requested that the acquittal on Count 1 of the Indictment pronounced by the Trial Chamber be reversed (persecution: forced labour). The Prosecution did not challenge the Trial Chamber’s definition in paragraph 359 of the Judgment but the application of that definition on a case-by-case basis. The Prosecution maintained that lack of consent may be established from the objective circumstances without proof of the victim’s subjective state of mind. The Trial Chamber had required the Prosecution to prove on a case-by-case basis not only that the detainees were afraid to work but also that they did not want to work. The Prosecution also claimed that evidence which establishes the victim’s subjective state of mind, showing that he was forced to work, would clearly be relevant.

The Appeals Chamber rejected the Prosecution’s argument stating:

[...] the Appeals Chamber rejects the Prosecution’s argument that evidence which establishes the victim’s subjective state of mind and relates to the facts indicating that he was forced to work is clearly relevant and may of itself be sufficient to establish lack of consent. The Appeals Chamber takes the view that such an opinion is not sufficient to establish forced labour and that the detainees’ personal conviction that they were forced to work must be proven with objective and not just subjective evidence. In this case, given the particular circumstances of the detention centre, there was sufficient objective evidence to prove that the detainees were in fact forced to work, thus bearing out their conviction that the labour they performed was forced”.³¹

The Appeals Chamber thus established that the labour had been forced and set out to determine whether the forced labour could be characterised as a crime of persecution. It pointed out that “the acts underlying the crime of persecution, whether considered in isolation or in conjunction with other acts, must constitute a crime of persecution of gravity equal to the crimes listed under Article 5 of the Statute” and that, in this case, “forced labour must be considered as part of a series of acts comprising unlawful detention and beatings whose cumulative effect is of sufficient gravity to amount to a crime of persecution, given that the unlawful detention and beatings were based on one or more of the discriminatory grounds listed under Article 5 of the

²⁴ *Ibid.*

²⁵ Appeals Judgement, para. 184.

²⁶ *Ibid.*

²⁷ Trial Judgment, para. 431.

²⁸ Appeals Judgement, para. 185.

²⁹ *Ibid.*, para. 186.

³⁰ *Ibid.*, para. 188.

³¹ *Ibid.*, para. 195.



Statute”.³² After carrying out an analysis of the facts of the case, showing that the Trial Chamber had been “misled by its case-by-case approach to each of the acts of forced labour”,³³ the Appeals Chamber concluded that discriminatory intent had been shown in forcing the eight detainees concerned to work and further determined that Krnojelac had to be found guilty as “a co-perpetrator of the joint criminal enterprise whose purpose was to persecute the non-Serb detainees by exploiting their forced labour”.³⁴

Persecution by way of deportation and expulsion

In its seventh ground of appeal, the Prosecution claimed that the Trial Chamber had erred in failing to find Krnojelac liable for the forced displacement of victims charged as persecution by way of deportation and expulsion punishable under Article 5(h) of the Statute. In examining the issues raised by this ground of appeal, the Appeals Chamber elaborated on the following points:

Acts of forced displacement and persecution

Mindful of the Indictment, the Appeals Chamber held that the Trial Chamber had disregarded the fact that the crime alleged was persecution by way of deportation and expulsion and not the separate crimes of expulsion or forcible transfer. The Appeals Chamber considered that, in this case, the Prosecution had used the terms “deportation” and “expulsion” in the Indictment as general terms in order to cover the acts of forcible displacement by which, the Prosecution alleged, the crime of persecution was committed.³⁵ It therefore held that the Trial Chamber should have ruled on the material facts alleged and decided whether such acts constituted persecution under Article 5(h) of the Statute. It found that, by failing to do so, the Trial Chamber had committed an error of law.³⁶

When it examined which acts of displacement may constitute persecution when committed with discriminatory intent, the Appeals Chamber upheld the finding made in the *Stakic* Judgment in which Trial Chamber II held that the prohibition against forcible displacements aims at safeguarding the right and aspiration of individuals to live in their communities and homes without outside interference and that the forced character of displacement and the forced uprooting of the inhabitants of a territory entail the criminal responsibility of the perpetrator, not the destination to which these inhabitants are sent. The Appeals Chamber consequently found that the “acts of forcible displacement underlying the crime of persecution punishable under Article 5(h) of the Statute are not limited to displacements across a national border”.³⁷ After analysing the relevant provisions of international humanitarian law, it made the finding that “displacements within a state or across a national border, for reasons not permitted under international law, are crimes punishable under customary international law, and these acts, if committed with the requisite discriminatory intent, constitute the crime of persecution under Article 5(h) of the Statute”.³⁸

Lack of genuine choice and the unlawfulness of displacement

The Trial Chamber had determined that there was general evidence that the detainees wanted to be exchanged, and that those selected for so-called exchanges had freely exercised their choice to go and did not have to be forced. It was not “satisfied that the displacement of these individuals from Foca, necessarily involved in the choice they made, was involuntary”.³⁹ While noting that the facts of the case showed that “the prisoners were

happy about the exchanges, which gave them hope and made them keenly wish to be liberated, and that some of the detainees even went so far as to ask to be exchanged”, the Appeals Chamber held that this did not necessarily imply that they had a “genuine choice”.⁴⁰ The Appeals Chamber set out that “it is the absence of genuine choice that makes displacement unlawful”⁴¹ and stated that “it is impossible to infer genuine choice from the fact that consent was expressed, given that the circumstances may deprive the consent of any value”.⁴²

The Appeals Chamber consequently analysed the evidence concerning these general expressions of consent in its context, taking into account the situation and atmosphere that prevailed in the KP Dom, the illegal detention, the threats, the use of force and other forms of coercion, the fear of violence and the detainees' vulnerability - whereas the Trial Chamber had been content to consider the testimony in isolation. It noted that “living conditions in the KP Dom made the non-Serb detainees subject to a coercive prison regime which was such that they were not in a position to exercise genuine choice” and concluded that the 35 detainees in question had been under duress and that the Trial Chamber had erred in finding that they had freely chosen to be exchanged.⁴³

Discriminatory nature of the acts of displacement

The Trial Chamber had stated that there was “no direct evidence showing that the displacement was committed on one of the listed discriminatory grounds”.⁴⁴ The Appeals Chamber pointed out that the discriminatory intent of forced displacements “cannot be directly inferred from the general discriminatory nature of an attack described as a crime against humanity”⁴⁵ but that, given the facts of the case, there were circumstances surrounding the commission of the acts charged that made it possible to infer that there was such an intent.

Given these conclusions, as well as the discriminatory character of the unlawful detention and the imposition of the above living conditions on the non-Serb KP Dom detainees,⁴⁶ the Appeals Chamber considered that it was “not reasonable for the Trial Chamber to conclude that there was no evidence that the 35 detainees had been transferred to Montenegro on the requisite discriminatory grounds”.⁴⁷

The Appeals Chamber was convinced, beyond all reasonable doubt, that Krnojelac was liable as a co-perpetrator in a joint criminal enterprise whose objective was to persecute the KP Dom detainees by deporting and expelling them.⁴⁸ It noted that the Accused was not charged with the alleged deportations and expulsions as a participant in the second category of a joint criminal enterprise (based on the concept of a system), but as a participant in the first category of such an enterprise, which requires Krnojelac to have shared the intent of the principal perpetrator. After analysing the facts of the case, it found that Krnojelac was responsible, as a co-perpetrator, for persecution by way of forcible displacement which, as the Prosecution alleged, took the form of “deportation” and “expulsion”.⁴⁹

Sentence

Both parties raised grounds of appeal relating to the seven-and-a-half-year sentence imposed by the Trial Chamber. Among these grounds, the Appeals Chamber had to rule on what weight it should attach to the effects of a crime on the victims' relatives when assessing the gravity of that crime.

³² *Ibid.*, para. 199.

³³ *Ibid.*, para. 202.

³⁴ *Ibid.*, para. 207.

³⁵ *Ibid.*, para. 214.

³⁶ *Ibid.*, para. 216.

³⁷ *Ibid.*, para. 218. See *Stakic*, IT-97-24-T, Judgement (“*Stakic* Judgement”), 31 July 2003, para. 677, *Judicial Supplement* No. 43.

³⁸ Appeals Judgement, para. 222.

³⁹ Trial Judgment, para. 483.

⁴⁰ Appeals Judgement, para. 229.

⁴¹ *Ibid.*

⁴² *Ibid.*, footnote omitted.

⁴³ Appeals Judgement, para. 233.

⁴⁴ Trial Judgment, para. 483.

⁴⁵ Appeals Judgement, para. 235. The Appeals Chamber used the same type of analysis in para. 184 of the Appeals Judgement (see *supra* “Persecution and discriminatory intent”).

⁴⁶ See for instance paragraph 193 of the Appeals Judgement.

⁴⁷ Appeals Judgement, para. 237.

⁴⁸ *Ibid.*, para. 241.

⁴⁹ *Ibid.*, para. 247.



Effects on the victims' relatives and the gravity of the crime

The Prosecution challenged the finding in paragraph 512 of the Judgment, namely: that the effects of a crime upon the relatives of the immediate victims are irrelevant to the culpability of the offender or the sentence: "The Prosecution has submitted that what it calls an 'in personam evaluation' of the gravity of the crime could or should also concern the effect of that crime on relatives of the immediate victims. The Trial Chamber considers that such effects are irrelevant to the culpability of the offender, and that it would be unfair to consider such effects in determining a sentence".⁵⁰

The Appeals Chamber noted that, without blurring the well known distinction between reparation and punishment, "the case-law of some domestic courts"⁵¹ shows that a trial chamber may still

take into account the impact of a crime on a victim's relatives when determining the appropriate punishment".⁵² It consequently found that "even where no blood relationships have been established, a trier of fact would be right to presume that the Accused knew that his victim did not live cut off from the world but had established bonds with others". It also held that although no consideration had been given to the effect of the crimes on these people in this instance, this fact had had no major impact on the sentence and that there was, therefore, no reason to amend it. The Appeals Chamber took the view that the Prosecution had not provided it with sufficient evidence to enable it to assess the actual consequences of the crimes on the victims' relatives.⁵³

⁵⁰ Trial Judgment, para. 512.

⁵¹ See, for example, in the United States, *Payne v. Tennessee*, 111 S. Ct. 2597, 2615-2616 (1991); 18 U.S.C. § 3593. See also, in the United Kingdom, *R. v. Cooksley* [2003] 2 Cr. App. R. 18; *R. v. Delaney*, 2003 WL 033375 (CA (Crim. Div.)); *R. v. McSween*, 2002 WL 31452147 (CA (Crim. Div.)); *R. v. Kelly & Donnelly*, [2001] 2 Cr. App. R. (S.) 73. See also, in Canada, *R. v. Jack*, 2001 Yuk. S. Ct., 542; *R. v. Duffus*, 40 C.R. (5th) 350 (Ont. Sup. Ct. 2000); *R. v. Emarad* [1999] B.C.J. no. 463 (British Columbia Supreme Court). See also, in Australia, *R. v. Hebllos*, [2000] VSCA 229; *R. v. Willis*, [2000] VSC 297; *R. v. Birmingham*, 96 A. Crim. R. 545 (S. Ct. S.A. 1997); *Mitchell v. R.*, 104 A. Crim. R. 523 (Crim. App. W.A. 1998); *R. v. P.*, 39 FCR 276 (1992); *cf. R. v. Previtera*, 94, A. Crim. R. 76 (S. Ct. N.S.W. 1997) (footnote 415 of the Appeals Judgement).

⁵² Appeals Judgement, para. 260.

⁵³ *Ibid.*

JOINT CRIMINAL ENTERPRISE

FORMS OF JOINT CRIMINAL ENTERPRISE

Article 7(1) of the Statute¹ provides for several types of individual criminal responsibility which apply to all the crimes falling under the Tribunal's jurisdiction. While Article 7(1) of the Statute does not expressly mention joint criminal enterprise, it was recognized in *Tadic* that this form of criminal responsibility is well established in international customary law and implicitly contained in the Statute.² The findings of the *Tadic* Appeals Judgement were recently confirmed by the Appeals Chamber in the "Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction".³ The *Tadic* Appeals Judgment sets out three distinct categories of joint criminal enterprise:

- The first category includes cases where all co-defendants, acting pursuant to a common design, possess the same criminal intention (the basic form of joint criminal enterprise);⁴
- The second distinct category of cases embraces the so-called "concentration camp" cases. This notion of common purpose applies to instances where the offences charged were alleged to have been committed by members of military or administrative units such as those running concentration camps (the systemic form of joint criminal enterprise);⁵
- The third category concerns cases involving a common design to pursue one course of conduct where one of the perpetrators commits an act which, while outside the common design, was nevertheless a natural and foreseeable consequence of the execution of that common purpose (the extended form of joint criminal enterprise).⁶

The *Tadic* Appeals Judgment also defines the objective elements (*actus reus*) and subjective elements (*mens rea*) of joint criminal enterprise.

The Appeals Chamber set out the objective elements of this mode of participation in one of the crimes provided for in the Statute (the same with regard to each of the three categories) as follows:

- (i) A plurality of persons. They need not be organised in a military, political or administrative structure;
- (ii) The existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute. There is no necessity for this plan, design or purpose to have been previously arranged or formulated. The common plan or purpose may materialise extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise;
- (iii) Participation of the accused in the common design involving the perpetration of one of the crimes provided for in the Statute. This participation need not involve commission of a specific crime under one of those provisions (for example, murder, extermination, torture, rape, etc.), but may take the form of assistance in, or contribution to, the execution of the common plan or purpose.⁷

By contrast, the *mens rea* element differs according to the category of common design under consideration:

1. With regard to the first category, what is required is the intent to perpetrate a certain crime (this being the shared intent on the part of all co-perpetrators);
2. With regard to the second category, personal knowledge of the system of ill-treatment is required (whether proved by express testimony or a matter of reasonable inference from the accused's position of authority), as well as the intent to further this common concerted system of ill-treatment;
3. With regard to the third category, what is required is the *intention* to participate in and further the criminal activity or the criminal purpose of a group and to contribute to the joint criminal enterprise or in any event to the commission of a crime by the group. In addition, responsibility for a crime other than the one agreed upon in the common plan arises only if, under the circumstances of the case, (i) it was *foreseeable* that such a crime might be perpetrated by one or other members of the group and (ii) the accused *willingly took that risk*.⁸

BASIC FORM OF JOINT CRIMINAL ENTERPRISE V. SYSTEMIC FORM: THE PROSECUTION'S BURDEN OF PROOF

The Appeals Chamber in *Krnjelac* affirmed that the systemic form of joint criminal enterprise may be applied to the serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.⁹ The principle elements of each form of joint criminal enterprise are:

Basic form

- The accused must voluntarily participate in one aspect of the common design (for instance, by inflicting non-fatal violence upon the victim, or by providing material assistance to or facilitating the activities of his co-perpetrators); and
- the accused, even if not personally affecting the killing, must nevertheless intend this result.¹⁰

Systemic form

- The accused must have personal knowledge of the nature of the system of ill treatment (this can be proved by express testimony or inferred from the accused's position of authority);
- the accused must have the intent to further the common concerted design of ill treatment.¹¹

If the Prosecution decides to base an indictment on the participation in a common design (basic form of joint criminal enterprise) and not on the contribution to a system (systemic form of joint criminal enterprise), the Prosecution will have to prove for each crime alleged that the perpetrator had the same intention as the principal perpetrators. However, if the Prosecution decides to categorise the crimes in the indictments as part of a system (systemic form of joint criminal enterprise), the burden of proof will change. The Prosecution will then have to prove that the accused intended to contribute to the system, *i.e.* will have to prove that the accused had personal knowledge of the system in question (this can be proved by express testimony or inferred from the accused's position of authority) as well as showing an intention to further the common concerted system.¹²

¹ Article 7 (Individual criminal responsibility)

1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.

² *Tadic*, IT-94-1-A, Appeals Judgment ("Tadic Appeals Judgement"), 15 July 1999, para. 220, Judicial Supplement No. 6.

³ *Milutinovic et al.*, IT-99-37-AR72, Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction - Joint Criminal Enterprise², 21 May 2003, Judicial Supplement No. 41.

⁴ *Tadic* Appeals Judgement, para.196.

⁵ *Ibid.*, paras. 202 and 203.

⁶ *Ibid.*, para. 204.

⁷ *Ibid.*, para. 227.

⁸ *Ibid.*, para. 228.

⁹ Para. 89 of the Appeals Judgement. See the summary of the Appeals Judgement under "Systemic Form of joint criminal enterprise".

¹⁰ *Tadic* Appeals Judgement, para. 196.

¹¹ *Ibid.*, para. 203.

¹² Para. 89 of the Appeals Judgement.



Separate Opinion of Judge Schomburg

Judge Schomburg agreed with the conclusions reached by the Appeals Chamber but said that a more holistic approach as to the assessment of the facts and the individual criminal responsibility would have been preferable and that a judgment should be more elaborate on the reasons as to how a Chamber comes to the proportional sentence. This notwithstanding, he limited his analysis to the Prosecution's seventh ground of appeal, *i.e.* persecution by way of deportation.

He expressed the view that the primary goal of the Appeals Chamber is to offer guidance and harmonisation for future decisions by Trial Chambers and stated that the Appeals Chamber should have felt itself obligated to discuss the definition of deportation.⁵⁴ Judge Schomburg asserted that such a definition was particularly important since the Tribunal's case-law on this issue was not uniform.

Judge Schomburg stated that the elements of the crime of deportation as a crime against humanity are:

Actus reus: forcibly removing or uprooting individuals from the territory and the environment in which they are lawfully present. A fixed destination is not required.⁵⁵

Mens rea: the intent to remove the victim, which implies that the victim can or will not return.⁵⁶

Whilst he concurred with the conclusion of the Appeals Chamber that the acts classified by it as forcible displacement amount to persecution, he said that he would define the underlying conduct as deportation.

Separate Opinion of Judge Shahabuddeen

Whilst Judge Shahabuddeen agreed with the Judgment of the Appeals Chamber, in his separate opinion, he proposed to speak on points on which the Appeals Chamber had not elaborated regarding deportation, the gravity of the crime of persecution, and whether the detainees had a genuine possibility of consenting to work.

He concurred with the Appeals Chamber's view that it should not examine the definition of the crime of deportation. Whilst he accepted that the Appeals Chamber had the authority to determine issues of general importance, he asserted that such competence could not be exercised freely. Judge Shahabuddeen held that, in order for such competence to be exercised, there had to be sufficient linkage with the determination of the appeal (which in his view was not the case). He went on to state that this power remains discretionary and that, in this instance, the issue may be determined in other appeals proceedings.

As to the gravity of the crime of persecution, he observed that an act could constitute a crime against humanity committed through persecution only if it was itself a crime enumerated in articles 5(a) to (g) of the Statute or if it attained a gravity comparable to that of an enumerated crime. However, he stated that this principle must be applied with caution. Under Article 5(h), the supporting crime is persecution, the underlying acts being only evidence of the persecution (he asserted that it is persecution which must attain the same gravity as that of the other crimes enumerated in the Statute); the underlying act does not have to be a crime specified in the Statute and may be a crime that is not specified anywhere in international criminal law,⁵⁷ provided of course that the crime in question attains the level of gravity of an enumerated crime in the Statute.

On the issue of whether genuine consent was possible, Judge Shahabuddeen stated that consent is a matter of will. He asserted that the general atmosphere prevailing at the prison, as portrayed by the Prosecution, showed that there was no possibility of genuine consent and that while the task of the Prosecution was rightly heavy; it should not be made unmanageably so. As such, he concurred with the Appeals Chamber's conclusions that were at variance with the findings of the Trial Chamber which, despite the body of evidence, had held that the fact that some of the detainees wanted to be transferred made consent possible. ■

⁵⁴ In paragraph 224 of the Appeals Judgement, the Appeals Chamber stated that it was "not necessary to express a view either supporting or rejecting the Trial Chamber's definition of the terms 'deportation' and 'expulsion'".

⁵⁵ Paragraph 15, making reference to paragraph 679 of the *Stakic* Judgement (see footnote 37 of this summary).

⁵⁶ Paragraph 15.

⁵⁷ On this subject see *Kvočka*, IT-98-30/1-T, Judgement, 2 November 2001, para. 186: "jurisprudence from World War II trials found acts or omissions such as denying bank accounts, educational or employment opportunities, or choice of spouse to Jews on the basis of their religion, constitute persecution. Thus, acts that are not inherently criminal may nonetheless become criminal and persecutory if committed with discriminatory intent." A summary of this

The Prosecutor v. Milutinovic *et al.* - Case No. IT-99-37-AR73.2

Judges Weinberg de Roca [Presiding], Pocar, Shahabuddeen, Hunt & Güney

“DECISION ON INTERLOCUTORY APPEAL ON MOTION FOR ADDITIONAL FUNDS”

13 NOVEMBER 2003

Review of a decision by the Registrar on a request for additional funds - Equality of arms - Criteria for the allotment of resources to Defence teams.

Review of a decision by the Registrar on remuneration of counsel: if there is no effect of a Registrar's decision upon the fairness of the trial, the accused should be left to pursue the remedy given in Article 31 of the Directive which requires the Registrar, in the event of a disagreement relating to calculation of fees, payment of remuneration, or reimbursement of expenses of Defence Counsel, to make a decision, after consulting the President and, if necessary, the Advisory Panel.

Equality of arms: equality of arms between the Defence and the Prosecution does not necessarily amount to the material equality of possessing the same financial and/or personal resources. The principle of equality of arms would be violated only if either party is put at a disadvantage when presenting its case.

Criteria for the allotment of resources to Defence teams: the amount of resources allocated to each Defence team depends on factors such as the level of complexity of the case and the amount of work required to ensure effective pre-trial preparation. It is the amount of work required, rather than the length of the pre-trial stage, which should determine the allotment for each Defence team.

Procedural Background

- Dragoljub Ojdanic (“Accused”) was indicted on 24 May 1999 for war crimes and crimes against humanity allegedly committed in villages and municipalities throughout Kosovo between January and June 1999. He is charged with individual and superior responsibility on the basis of his position of Chief of Staff of the Yugoslavian Army, as well as his membership in a joint criminal enterprise with the then President of the Federal Republic of Yugoslavia (Slobodan Milosevic), the then President of the Republic of Serbia (Milan Milutinovic), the then Vice-Premier of the Federal Republic of Yugoslavia (Nikola Sainovic) and other persons.

- Under the Tribunal's Legal Aid System (“Legal Aid System”), his case was ranked at level III by the Registrar in consultation with the Trial Chamber on 31 January 2003.¹ Fr the pre-trial phase, the Registrar allocated a maximum of 3,000 working hours for counsel and co-counsel and 4,000 working hours for investigators and legal assistants. Being partially indigent, the Accused bore the costs of 400 hours of investigative work at the pre-trial stage.

- In a letter dated 5 March 2003, the Accused requested the allocation of additional resources. He claimed that further resources were necessary because of the specificity of the case and the anticipated work necessary to prepare the case for trial. His request was rejected by the Registrar on 3 April 2003 who considered that the tasks put forward by the Accused had already been taken into account when ranking the case at level III.

- In a motion dated 15 April 2003, the Accused sought review of the Registrar's decision by the Trial Chamber. He alleged that the resources provided were insufficient to ensure an effective and competent defence and therefore requested the allocation of additional resources.

- On 8 July 2003, the Trial Chamber rendered its “Decision on Motion for Additional Funds” (“Impugned Decision”). It recognised that the Registrar has the primary responsibility for the determination of matters relating to remuneration of counsel under the Legal Aid System and held that “in the exercise of its

powers under Rule 54² of the Rules and the Trial Chamber's statutory obligation to ensure a fair and expeditious conduct of the proceedings with full respect for the rights of the accused, the Trial Chamber is undoubtedly empowered to review the Registrar's decision, albeit only upon exceptional circumstances being shown”.³ It accepted as valid “the Registrar's Comment that while the Registrar is open to certain flexibility in considering requests for additional resources, the Defence should demonstrate exceptional circumstances or circumstances beyond its control if such requests are to be granted”. The Trial Chamber considered that no such circumstances had been shown and accordingly denied the Motion.⁴

- On 11 July 2003, General Ojdanic requested certification to appeal the Impugned Decision.⁵ The Trial Chamber granted certification on 16 July 2003.⁶ On 23 July 2003, Ojdanic (“Appellant”) filed his appeal against the Impugned Decision.⁷

- On 29 August and 3 September 2003 respectively, the Association of Defence Counsel Practising Before the International Criminal Tribunal for the Former Yugoslavia (“ADC-ICTY”) filed an *amicus curiae* brief in support of the appeal and then submitted an addendum. On 30 September 2003, the *Association Internationale des Avocats de la Défense* – International Criminal Defence Attorneys Association (“AIAD-ICDAA”) filed a motion to appear as an *amicus curiae* and to join in the brief of the ADC-ICTY.

Decision

The Appeals Chamber dismissed the Appeal and denied the ADC-ICTY motion for leave to file its *amicus curiae* brief and addendum as well as the submission of the AIAD-ICDAA.

² Rule 54 (General Rule)

At the request of either party or *proprio motu*, a Judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial.

³ Impugned Decision, page 5.

⁴ *Ibid.*

⁵ General Ojdanic's Request for Certification to Appeal *Decision on Motion for Additional Funds*, 11 July 2003.

⁶ Decision on Defence Request for Certification of Appeal against the Decision of the Trial Chamber on Motion for Additional Funds, 16 July 2003.

⁷ *Ex Parte* General Ojdanic's Appeal of Decision on Motion for Additional Funds, 23 July 2003.

¹ See Comprehensive Report on the Progress made by the International Criminal Tribunal for the Former Yugoslavia in Reforming its Legal Aid System, Report of the Secretary-General, General Assembly, Fifty-Eighth session, 12 August 2003, A/58/288). Available on the Tribunal's website at www.un.org/icty (under “Basic Legal Documents/Defence”).

Reasoning

Amici curiae

The Appeals Chamber considered that the ADC-ICTY and the AIAD-ICDAA submissions related predominantly to the larger issue of the “merits and deficiencies” of the Legal Aid System and therefore found that it was “not desirable for the proper determination of this case” to grant them leave to appear as *amicus curiae* pursuant to Rule 74 of the Rules of Procedure and Evidence.⁸

Review of a decision by the Registrar on a request for additional funds

The Appeals Chamber found that the Trial Chamber had correctly considered that “the Registrar has the primary responsibility for the determination of matters relating to remuneration of counsel under the Legal Aid System of the International Tribunal”.⁹ It recalled its previous finding that where the Directive on Assignment of Defence Counsel (“Directive”) expressly provides for a review of the Registrar’s Decision, the Trial Chamber cannot interfere in the Registrar’s decision and has to stay the trial until that procedure has been completed.¹⁰ However it held that, where the Directive does not expressly provide for a review of the Registrar’s decision, the Trial Chamber, pursuant to its statutory obligation to ensure the fairness of the trial, is competent to review the Registrar’s decision in light of its effect upon the fairness of the trial.¹¹ The Appeals Chamber stated that “[t]he exercise of such power should, however, be closely related to the fairness of the trial, and [...] should not be used as a substitute for a general power of review which has not been expressly provided for in the Directive”.¹² It held:

“If there is no effect of the Registrar’s decision upon the fairness of the trial, the accused should be left to pursue the remedy given in Article 31 of the Directive which requires the Registrar, in the event of a disagreement relating to calculation of fees, payment of remuneration, or reimbursement of expenses of Defence Counsel, to make a decision, after consulting the President and, if necessary, the Advisory Panel”.¹³

The Appeals Chamber noted that the Trial Chamber had correctly assessed the elements of the case. It invited the Registrar to comment on the Defence Motion for Additional Funds. “Mindful of its obligations to ensure a fair and expeditious conduct of the proceedings with full respect for the rights of the accused”, it took into account the submissions of both parties and all the relevant factors in reaching the decision that no exceptional circumstances existed for granting additional funds to the Defence.¹⁴ The Appeals Chamber further found that the Appellant had failed to show that the Trial Chamber committed an error in accepting the Registrar’s finding that the Defence had not demonstrated any “exceptional circumstances or circumstances beyond its control which would warrant additional resources during the pre-trial phase”.¹⁵

⁸ Rule 74 (*Amicus Curiae*)

A Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organization or person to appear before it and make submissions on any issue specified by the Chamber.

⁹ Para. 19.

¹⁰ *Blagojević*, IT-02-60-AR73.4, *Ex Parte* and Confidential Decision on Appeal by Vidoje Blagojević to Replace his Defence Team, 7 November 2003, para. 7.

¹¹ Para. 19.

¹² Para. 20.

¹³ *Ibid.* Pursuant to Article 32 of the Directive, the Advisory Panel consists of two members chosen by the President of the Tribunal by ballot from members of the ADC-ICTY who have appeared before the Tribunal, two members proposed by the International Bar Association, two members proposed by the Union Internationale des Avocats, and the President of the Nederlandse Orde van Advokaten or his representative. Each member of the Advisory Panel must have a minimum of 10 years legal experience. The President of the Advisory Panel will be the President of the Nederlandse Orde van Advokaten or his representative. The membership of the Advisory Panel shall come up for appointment every two years on the anniversary date of the entry into force of this Directive.

¹⁴ Para. 21

¹⁵ *Ibid.*

Addressing the Appellant’s claim that his assigned counsel may be ethically required to withdraw from representing the Appellant because they do not have adequate resources to defend him, the Appeals Chamber observed that “the assigned counsel agreed to represent the Appellant, aware of the system of remuneration for assigned counsel, and are bound thereby”.¹⁶ It found that there had been “no change in the terms of representation or in the initial agreement, and [that] counsel [were] required to fulfil their obligations to the International Tribunal”.¹⁷

Equality of arms

The Appellant submitted that the Trial Chamber had misdirected itself in law when it failed to consider the impact of the Registrar’s decision on the right of the accused to “equality of arms”. The Appeals Chamber recalled the its findings in the *Kayishema and Ruzindana* case that “equality of arms between the Defence and the Prosecution does not necessarily amount to the material equality of possessing the same financial and/or personal resources”.¹⁸ It also referred to the *Tadić* case in which the Appeals Chamber took the view that “equality of arms obligates a judicial body to ensure that neither party is put at a disadvantage when presenting its case”.¹⁹

The Appeals Chamber found that the Appellant had “not shown how the Trial Chamber [had] failed to address the imbalance of resources between the Prosecution and the Defence and in that way violated the principle of equality of arms”.²⁰ It declared that the principle of equality of arms would be violated “only if either party [was] put at a disadvantage when presenting its case”.²¹ In the circumstances of this case, the Appeals Chamber found that the Appellant could not rely on the alleged inadequacy of funds during the pre-trial stage to establish such a disadvantage.

Criteria for the allotment of resources to Defence teams

The Appellant alleged that the Trial Chamber had erred by consulting the Registrar given that he had failed to assess properly the request for additional funds. The Appeals Chamber found, on the face of the language used in Article 22 of the Directive,²² that the Registrar had “misdirected himself when he affirmed in his submissions to the Trial Chamber that ‘the actual duration of the pre-trial stage is not a relevant factor’²³ to take into account when allocating a lump sum under the Legal Aid System”.²⁴ However, the Appeals Chamber found that the Registrar was correct in that he found that the amount of resources allocated to each Defence team depends on factors such as the level of complexity of the case and the amount of work required to ensure effective pre-trial preparation.²⁵ The Appeals Chamber held that “it is the amount of work required, rather than the length of the pre-trial stage, which should determine the allotment for each Defence team”.²⁶

¹⁶ Para. 22. The Appeals Chamber referred to Article 9(C) of the Code of Professional Conduct for Counsel Appearing Before the International Tribunal, IT/125 REV. 1, as amended on 12 July 2002, which states: “Subject to leave from the Chamber, if representation by counsel is to be terminated or withdrawn, counsel shall not do so until a replacement counsel is engaged by the client or assigned by the Registrar, or the client has notified the Registrar in writing of his intention to conduct his own defence”.

¹⁷ Para. 22.

¹⁸ Para. 23, *Kayishema and Ruzindana*, ICTR-95-1-A, Judgement, 1 June 2001, para. 69

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ *Ibid.*, by reference to *Tadić*, IT-94-1-A, Judgement, 15 July 1999, para. 48.

²² Article 22 of the Directive (Responsibility for remuneration and expenses) states in relevant part: “A. (...) The Registrar establishes maximum allotments for each defence at the beginning of every stage of the procedure taking into account his estimate of the duration of the phase” (emphasis added).

²³ Impugned Decision, p. 3 citing the “Registry Comments on Defence Motion for Additional Funds”, filed 13 June 2003, paras. 4-5.

²⁴ Para. 25.

²⁵ See Registry Comments on Defence Motion for Additional Funds, 13 June 2003, paras. 4-5.

²⁶ Para. 25



Separate Opinion of Judge Shahabuddeen

Judge Shahabuddeen agreed with the Decision of the Appeals Chamber and proposed to support its “chief proposition that an extension of the duration of the pre-trial stage is not a sufficient reason for paying out additional legal aid funds unless justified by work which was not estimated when the original grant was made” (para. 1).

Judge Shahabuddeen analysed *inter alia* the relevant part of Article 22(A) of the Directive which states that “[i]n the event that a stage of the procedure is substantially longer or shorter than estimated, the Registrar may adapt the allotment”. He held that:

the word “may” does not give a discretionary power to the Registrar: “If [...] the phase of the procedure is indeed substantially longer than estimated, the Appellant has a legal right to additional funds and, correspondingly, the Registrar has no discretion in deciding whether to make an adaptation in order to effectuate that legal right” (para. 6); the word “substantially” qualifies “not only the temporal aspect of an extension but also the material aspect of an extension”. The phrase “substantially longer [...] than estimated” means that there is “unestimated work which remains to be done in order to bring that phase of the procedure to a close”. Thus “an entitlement to additional funds depends not merely on whether there is an extension of duration but on whether that extension reflects an increase in work over and above the level originally estimated” (para. 7).

As a result, Judge Shahabuddeen found that “if duration is extended but no unestimated work has to be done, the Registrar is entitled to say that the phase of the procedure is not substantially longer than estimated within the meaning of the applicable provision”. He added that “it would be wrong to hold that a shortening of duration mechanically results in a corresponding reduction in funds even where there has been no reduction of work” (para. 8).

Further, Judge Shahabuddeen interpreted the last sentence of Article 22(A) of the Directive²⁷ as “being applicable only if the Registrar decides to adapt the existing allotment and there is a disagreement as to what should be the new maximum” (para. 12).

Separate Opinion of Judge David Hunt

Judge Hunt analysed the background of the appeal as well as the case-law regarding the review of decisions made by the Registrar.²⁸ He examined *inter alia* the procedure laid down in Article 22(A) of the Directive in cases of disagreement between the Registrar and Defence counsel on to the maximum allotment. He stated that:

the procedure whereby the Registrar is obliged to consult with the Trial Chamber and, if necessary, the Advisory Panel, is “sufficiently analogous to a review as to require a similar restraint upon the power of the Trial Chamber to act beyond staying the proceedings until that procedure has been carried out” (para. 15);

if there is a disagreement between the Registrar and the Trial Chamber as a result of that consultation, or if the Accused still challenges the decision of the Registrar after he has consulted with the Trial Chamber, it becomes necessary for the Registrar to consult with the Advisory Panel also (para. 18).²⁹

Judge Hunt considered each ground of appeal separately and found that he would have upheld the third ground and returned the matter to the Registrar for him to reconsider the allotment of additional funds. He considered that the requirements for “exceptional circumstances” or “events beyond the influence of the Defence” in support of a claim for additional funds were “invalid limitations” to the flexibility allowed for by the Legal Aid System. ■

²⁸ Judge Hunt analysed the following decisions: *Delalic et al*, IT-96-21-A, Order on Esad Landzo's Motion for Expedited Consideration, 15 September 1999; *Hadzihasanovic et al*, IT-01-47-PT, Decision on Prosecution's Motion for Review of the Decision of the Registrar to Assign Mr Rodney Dixon as Co-Counsel to the Accused Kubura, 16 Mar 2002; *Halilovic*, IT-01-48-PT, Decision on Sefer Halilovic's Application to Review the Registrar's Decision of 19 June 2002, 1 August 2002; *Martic*, IT-95-11-PT, Decision on Appeal Against Decision of Registry, 2 August 2002, *Judicial Supplement* No. 35; *Knezevic*, IT-95-4&8/1-PT, Decision on Accused's Request for Review of Registrar's Decision as to Assignment of Counsel, 6 September 2002, *Judicial Supplement* No. 36; *Zigic*, IT-98-30/1-A, Decision on Review of Registrar's Decision to Withdraw Legal Aid from Zoran Zigic, 7 February 2003, *Judicial Supplement* No. 40; *Hadzihasanovic & Kubura*, IT-01-47-PT, Decision on Urgent Motion for *Ex Parte* Oral Hearing on Allocation of Resources to the Defence and Consequences Thereof for the Rights of the Accused to a Fair Trial, 17 June 2003.

²⁹ Judge Hunt reasoned by analogy to the procedure whereby the Bureau has to be consulted when the decision of a Presiding Judge on the disqualification of a Judge is contested by the moving party (*Galic*, IT-98-29-AR54, 13 March 2003, Decision on Appeal from Refusal of Application for Disqualification and Withdrawal of a Judge, *Judicial Supplement* No. 40).

²⁷ It reads: “In the event of disagreement on the maximum allotment, the Registrar shall make a decision, after consulting the Chamber and, if necessary, the Advisory Panel”.

TRIAL CHAMBERS

The Prosecutor v. Blagoje Simic, Miroslav Tadic, Simo Zaric - Case No. IT-95-9-T

Trial Chamber II (Judges Mumba [Presiding], Williams and Lindholm)

“JUDGEMENT”

17 OCTOBER 2003

Forcible takeover as persecution – Unlawful arrest as persecution - Interrogation as persecution – Deportation and forcible transfer: unlawful character of displacement, destination following displacement, intent of the perpetrator.

Forcible takeover as persecution: a forcible takeover, *per se*, does not reach the same level of gravity as the other crimes against humanity and, on its own, does not amount to persecution. However, a forcible takeover may serve as the basis for the perpetration of the other persecutory acts as it provides the conditions necessary for the adoption and enforcement of policies infringing upon basic rights of citizens on the basis of their political, ethnic, or religious background.

Unlawful arrest as persecution: while unlawful arrest may not in itself constitute a gross or blatant denial of a fundamental right reaching the same level of gravity as the other acts prohibited under Article 5, when considered in context, together with unlawful detention or confinement, such acts may constitute the crime of persecution as a crime against humanity.

Interrogation as persecution: the individual acts of interrogation of civilians who have been arrested and detained and forcing them to sign false and coerced statements, as alleged in themselves, do not meet the seriousness requirement to constitute persecution and a crime against humanity. They may, however, form part of a series of acts which comprise an underlying persecutory act.

Deportation and forcible transfer:

- ***unlawful character of displacement:*** what matters is the personal consent or wish of an individual, as opposed to collective consent as a group, or consent expressed by official authorities, in relation to an individual person, or a group of persons;
- ***destination following displacement:*** the location to which the victim is forcibly displaced is sufficiently distant if the victim is prevented from effectively exercising his/her right to stay in his/her home and community and his/her right not to be deprived of his/her property;
- ***intent of the perpetrator:*** a finding of forced displacement, either as deportation or forcible transfer, requires an element of permanency in relation to the intention of the accused for the victim not to return. Whether persons forcibly displaced are able to return to their former place of residence at a later time has no bearing on the assessment of the legality of the original displacement. The duration of the displacement has no impact on its illegality as otherwise the perpetrator who had the intent to displace the victim permanently would unjustifiably benefit from such return.

Background

● The three Accused (“the Accused”), Blagoje Simic, Miroslav Tadic and Simo Zaric, were originally indicted together with Slobodan Miljkovic, a/k/a “Lugar”, Milan Simic and Stevan Todorovic on 21 July 1995. Following guilty pleas by Stevan Todorovic¹ and Milan Simic,² the proceedings against these two were separated from the others.³ Proceedings against Slobodan Miljkovic were terminated upon his death on 8 August 1998.

● According to the Fifth Amended Indictment dated 30 May 2002 (“Indictment”), the Accused were charged with individual criminal responsibility pursuant to Article 7(1) of the Statute of the Tribunal (“Statute”) for: two counts of crimes against humanity under Article 5 of the Statute (Count 1: persecutions; Count 2: deportation) and one count of a grave breach of the Geneva Conventions of 1949 under Article 2 of the Statute (Count 3: unlawful deportation and transfer).

¹ Stevan Todorovic pleaded guilty on 13 December 2000 to one count of persecutions on political, racial and religious grounds as a crime against humanity. He was sentenced to 10 years’ imprisonment on 31 July 2001 and transferred to Spain on 12 December 2001 to serve his sentence.

² Milan Simic pleaded guilty on 15 May 2002 to two counts of torture as crimes against humanity and was sentenced to 5 years’ imprisonment on 17 October 2002. He was granted early release on 27 October 2003, effective 3 November, and released from the custody of the Tribunal on 4 November 2003.

³ Todorovic, IT-95-9/1; Milan Simic, IT-95-9/2.

Factual Findings⁴

The trial of the Accused covered the events which occurred in the Municipalities of Bosanski Samac and Odzak. The town of Bosanski Samac was of strategic importance for the conduct of military operations. The municipality formed part of the so-called Posavina Corridor, a narrow strip of flat land along the Sava River connecting the Serb-controlled areas within Croatia to the Bosnian Serb territories and the Republic of Serbia. The Corridor was the easiest and shortest way to establish a ground route between the Serb-controlled areas within Croatia to the west (Republika Srpska Krajina) and Serbia to the east.

The Accused held central positions in these areas. Dr. Blagoje Simic, a medical doctor, was President of the Municipal Board of the Serbian Democratic Party and President of the Serbian Crisis Staff in the municipality of Bosanski Samac. He continued as President when the Crisis Staff was renamed the War Presidency. He was the highest ranking civilian official in the municipality. Miroslav Tadic, a retired school teacher, was Assistant Commander for Logistics within the 4th Detachment, Commander of the Civil Protection Staff, *ex-officio* member of the Crisis Staff, and a member of the Exchange Commission in the municipality of Bosanski Samac. Simo Zaric was Assistant Commander for Intelligence, Reconnaissance, Morale and Information in the 4th Detachment, Chief of National Security in

⁴ The following factual findings are taken from the summary of the Judgement (see Press Release No. 792). The summary and the full text of the Judgement are available at the “Judgements” page on the Tribunal’s website (www.un.org/icty).

Bosanski Samac from 29 April 1992 to 19 May 1992, and Deputy to the President of the Civilian Council in Odzak.

The Trial Chamber found that the events which took place in the Municipalities of Bosanski Samac and Odzak between 17 April 1992 and 31 December 1993 constituted a widespread and systematic attack on the civilian population. This attack included the forcible takeover of power in Bosanski Samac by members of the paramilitary forces and Serb police, and the subsequent acts of persecution and deportation committed against non-Serb civilians.

The Trial Chamber was satisfied upon the evidence that members of the Crisis Staff (including its President Blagoje Simic); the Serb police (including its Chief of Police Stevan Todorovic, who was also a member of the Crisis Staff); Serb paramilitaries (including "Debeli" (Srcko Radovanovic, "Pukovnik"), "Crni" (Dragan Djordjevic), "Lugar" (Slobodan Miljkovic), and "Laki" (Predrag Lazarevic)); and the 17th Tactical Group of the JNA were all participants in a basic form of joint criminal enterprise, sharing the same intent to execute the common plan to persecute non-Serb civilians in the Bosanski Samac municipality.

The Trial Chamber inferred the common plan of the joint criminal enterprise from all the circumstances. It found that there was sufficient evidence to conclude that the participants in the joint criminal enterprise acted in unison to execute a plan that included the forcible takeover of the town of Bosanski Samac, taking over vital facilities and institutions in the town and persecuting non-Serb civilians in the municipality of Bosanski Samac, within the period set forth in the Indictment. This common plan was aimed at committing persecution against non-Serbs, including acts of unlawful arrest and detention, cruel and inhumane treatment including beatings, torture, forced labour assignments and confinement under inhumane conditions, and deportations and forcible transfer.

It found that Blagoje Simic, as President of the Municipal Assembly and the Crisis Staff (later renamed the War Presidency), was at the apex of the joint criminal enterprise at the municipal level. He was the highest-ranking civilian in Bosanski Samac municipality. He knew that his role and authority were essential for the accomplishment of the common goal of persecution. The Trial Chamber was convinced that Blagoje Simic and the other participants acted with the shared intent of pursuing their common goal of persecution. The Trial Chamber held, however, that while Blagoje Simic was a participant in the joint criminal enterprise, there was no evidence to conclude that Miroslav Tadic and Simo Zaric were participants.

Judgement

The Trial Chamber found Blagoje Simic guilty of Count 1 (crime against humanity of persecutions based upon the unlawful arrest and detention of Bosnian Muslim and Bosnian Croat civilians, cruel and inhumane treatment including beatings, torture, forced labour assignments, and confinement under inhumane conditions, and deportation and forcible transfer). It found him criminally responsible for the deportation of non-Serb civilians as a crime against humanity (Count 2), but did not enter a conviction as it found it to be impermissibly cumulative with Count 1.⁵ It dismissed Count 3 (unlawful deportation or transfer as a grave breach of the Geneva Conventions of 1949) due to defects in the form of the Indictment.⁶ The Trial Chamber, by a

majority, Judge Per-Johan Lindholm dissenting, sentenced Blagoje Simic to seventeen years' imprisonment.

The Trial Chamber, by a majority, Judge Per-Johan Lindholm dissenting, found Miroslav Tadic guilty of Count 1 (persecutions based upon deportation and forcible transfer). It found him criminally responsible for Count 2, but did not enter a conviction as it found it to be impermissibly cumulative with Count 1. It dismissed Count 3 due to defects in the form of the Amended Indictment. The Trial Chamber, by a majority, Judge Per-Johan Lindholm dissenting, sentenced Miroslav Tadic to eight years' imprisonment.

The Trial Chamber, by a majority, Judge Per-Johan Lindholm dissenting, found Simo Zaric guilty of Count 1 (persecutions based upon cruel and inhumane treatment including beatings, torture, and confinement under inhumane conditions). It acquitted him of Count 2 and dismissed Count 3 due to defects in the form of the Amended Indictment. The Trial Chamber, by a majority, Judge Per-Johan Lindholm dissenting, sentenced Simo Zaric to six years' imprisonment.

Legal Findings

The Trial Chamber *inter alia* addressed the definition of the crime of persecution as a crime against humanity with regard to the acts of forcible transfer, unlawful arrest and interrogation. It also reviewed the law on deportation and forcible transfer.

Forcible takeover as persecution

The crime of persecution may encompass both acts which are listed in the Statute⁷ and acts which are not.⁸ Acts or omissions enumerated under other paragraphs of Article 5 of the Statute are by definition serious enough, while those either listed under other Articles of the Statute or not listed in the Statute at all must reach the same level of gravity as the other crimes against humanity enumerated in Article 5. This test will only be met by gross or blatant denials of fundamental human rights.⁹

The forcible takeover of the Bosanski Samac Municipality was charged in the Indictment as an act of persecution. As this crime is not listed in the Statute, the Trial Chamber had to determine whether such acts could reach the same level of gravity as those acts enumerated in the Statute.

The Trial Chamber first referred to the findings of other Chambers which have concluded that an attack on cities, towns or villages is analogous to an "attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings" and thus constitutes "a violation of the laws or customs of war enumerated under Article 3(c) of the Statute".¹⁰ As such, it "must have caused deaths and/or serious bodily injury within the civilian population or damage to civilian property".¹¹ It then noted that the forcible takeover of a town has been qualified as an illegal *coup d'état*,¹² which the Trial Chamber defined as "a political move to overthrow an existing government by force".¹³

The Trial Chamber found that the Prosecution had failed to plead adequately the existence of an international armed conflict, which is one of the requisite jurisdictional elements for a charge based on Article 2 of the Statute (see paras. 104-120 of the Judgement). The Trial Chamber followed the same reasoning for Miroslav Tadic and Simo Zaric.

⁷ *Kupreskic et al.*, IT-95-16-T, Judgement ("Kupreskic Trial Judgement"), 14 January 2000, para. 605, *Judicial Supplement No. 11*; *Kvočka et al.*, Judgement ("Kvočka Trial Judgement"), 2 November 2001, para. 185, *Judicial Supplement No. 29*.

⁸ *Tadic*, IT-94-1-T, Judgement ("Tadic Trial Judgement"), 7 May 1997, para. 703; *Kupreskic Trial Judgement*, paras. 581 and 614; *Kordic & Cerkez*, IT-95-14/2-T, Judgement, ("Kordic Trial Judgement"), 26 February 2001, paras. 193-194 *Judicial Supplement No. 23*; *Kvočka Trial Judgement*, para. 185; *Naletilic & Martinovic*, IT-98-34-T, Judgement ("Naletilic Trial Judgement"), 31 March 2003, para. 635, *Judicial Supplement No. 42*.

⁹ *Krnjelac Trial Judgement*, para. 434; *Kupreskic Trial Judgement*, para. 621; *Naletilic Trial Judgement*, para. 635.

¹⁰ *Kordic Trial Judgement*, para. 203.

¹¹ *Blaskic Trial Judgement*, para. 180.

¹² *Stakic*, IT-97-24-T, Judgement ("Stakic Trial Judgement"), 31 July 2003, para. 84, *Judicial Supplement No. 43*.

¹³ The Trial Chamber relied on Black's Law Dictionary, 6th Edition, 1990.

⁵ Under the Tribunal's case-law, cumulative convictions (i.e. convictions for different crimes under the Statute based on the same conduct) are permissible only if each crime involved has a materially distinct element not contained in the others. An element is materially distinct from another if it requires proof of a fact not required by the other. Where this test is not met, the Chamber must enter the conviction only for the crime with a materially distinct element, as being the more specific crime. See *Delalic et al.*, IT-96-21-A, Judgement ("Celebici Appeals Judgement"), 20 February 2001, paras. 412-413, *Judicial Supplement No. 23*). The Trial Chamber followed the same reasoning for Miroslav Tadic.

⁶ In the words of the Appeals Chamber, "an Indictment, as the primary accusatory instrument, must plead with sufficient detail the essential aspect of the Prosecution case. If it fails to do so, it suffers from a material defect". See *Kupreskic et al.*, IT-95-19-A, Judgement ("Kupreskic Appeal Judgement"), 23 October 2001, para. 114, *Judicial Supplement No. 28*. In the present case, the

It expressed its view that a forcible takeover “does not necessarily encompass all the elements and the gravity associated with an attack on cities, towns or villages”¹⁴ and noted that it had been previously held by Trial Chamber III, in the *Kordic* Trial Judgement, that the exclusion of Bosnian Muslims from government did not rise to the same level of gravity as the other crimes against humanity and consequently did not constitute persecution.¹⁵

The Trial Chamber concluded that “a forcible takeover, *per se*, does not reach the same level of gravity as the other crimes against humanity and on its own does not amount to persecution”. It noted, however, that “a forcible takeover may serve as the basis for perpetration of other persecutory acts as it provides the conditions necessary for adoption and enforcement of policies infringing upon basic rights of citizens on the basis of their political, ethnic, or religious background”.¹⁶

Unlawful arrest as persecution

The Indictment charged the unlawful arrest, detention, and confinement of Bosnian Croats, Bosnian Muslims and other non-Serb civilians as acts of persecution. While the unlawful confinement of civilians is a grave breach of the Geneva Conventions of 1949 (Article 2(g) of the Statute)¹⁷ and the crime of imprisonment is listed as a crime against humanity in Article 5(e) of the Statute, unlawful arrest and detention do not appear as separate offences under Article 5 or other provisions of the Statute. The *Blaskic* Trial Chamber, however, considered unlawful detention as a form of the crime of persecution and defined unlawful detention as “unlawfully depriving a group of discriminated civilians of their freedom”.¹⁸ The *Kupreskic* Trial Chamber also held that the organised detention of civilians may constitute persecution.¹⁹ It remained for the Trial Chamber to determine whether unlawful arrest could be of the same gravity as a crime enumerated in the Statute and therefore constitute a crime of persecution as a crime against humanity.

Unlawful arrest had never been defined in the jurisprudence of the Tribunal. Relying on the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment²⁰ and on the right to be free from arbitrary arrest and imprisonment as enshrined in International Conventions,²¹ the Trial Chamber held that “the act of unlawful arrest means to apprehend a person, without due process of law”.²²

The Trial Chamber found that “while unlawful arrest may in itself not constitute a gross or blatant denial of a fundamental right reaching the same level of gravity as the other acts prohibited under Article 5, when considered in context, together with unlawful detention or confinement, such acts may constitute the crime of persecution as a crime against humanity”.²³

¹⁴ Judgement, para. 55.

¹⁵ The *Kordic* Trial Chamber further held that the criminal prohibition on the removal of members of government on discriminatory grounds had not reached the level of customary international law (*Kordic* Trial Judgement, para. 210).

¹⁶ Judgement, para. 56.

¹⁷ In the *Krnjelac* Trial Judgement (*Krnjelac*, IT-97-25-T, Judgement, 15 March 2002, para. 111, *Judicial Supplement* No. 31 *bis*) and the *Kordic* Trial Judgement (paras. 301-302), unlawful confinement was held to constitute persecution and a crime against humanity.

¹⁸ *Blaskic* Trial Judgement, para. 234.

¹⁹ *Kupreskic* Trial Judgement, para. 629.

²⁰ The Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment, as adopted by General Assembly Resolution 43/173, 9 December 1988, defines an arrest as: “the act of apprehending a person for the alleged commission of an offence or by the action of an authority”.

²¹ Article 5 of the European Convention of Human Rights provides for the right to liberty and security and states that no one shall be deprived thereof except in particular cases detailed in that Convention and in accordance with a procedure prescribed by law (European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), 213 U.N.T.S. 221, E.T.S. 5, Article 5). Article 9 of the International Covenant on Civil and Political Rights provides that everyone has the right to liberty and security of the person and states that no one shall be subjected to arbitrary arrest or detention, except in accordance with procedures established by law (Article 9 of the International Covenant on Civil and Political Rights (1976), 999 U.N.T.S. 171).

²² Judgement, para. 60.

²³ *Ibid.*, para. 62. The Trial Chamber also found “unlawful detention” to be an alternative term for “unlawful confinement” or “unlawful imprisonment” (para. 66). It therefore used the elements of this crime as defined in para. 115 of the *Krnjelac* Trial Judgement.

Interrogation as persecution

The acts of interrogating Bosnian Croats, Bosnian Muslims and other non-Serb civilians who had been arrested and detained, and forcing them to sign false and coerced statements were charged as persecution in the Indictment. Those acts, however, do not appear as separate offences in the Statute and have never been considered by the Tribunal to be of sufficient gravity to constitute offences charged in the Statute, such as persecution or torture, as crimes against humanity.²⁴

The Trial Chamber considered that “the underlying conduct of interrogation and forcing non-Serb civilians to sign false and coerced statements is relevant to the consideration of whether non-Serbs who were arrested and detained were deprived of their liberty arbitrarily, without any legal basis”.²⁵ It concluded:

“the interrogation of Bosnian Croats, Bosnian Muslims and other non-Serb civilians who had been arrested and detained, and forcing them to sign false and coerced statements, *as alleged in themselves*, do not meet the seriousness requirement to constitute persecution and a crime against humanity. They may, however, form part of a series of acts which comprise an underlying persecutory act”.²⁶

Deportation and forcible transfer

The crime of deportation is defined in the Tribunal’s case law as the forced displacement of persons by expulsion or other coercive acts from the area in which they are lawfully present, across a national border, without lawful grounds.²⁷ The crime of forcible transfer has been defined as a forced removal or displacement of people from one area to another which may take place within the same national borders.²⁸

The Trial Chamber noted that both deportation and unlawful or forcible transfer relate to the involuntary and unlawful displacement of persons from the territory in which they reside. It sets out which common elements needed to be proven for the underlying acts to be established: (i) the unlawful character of the displacement; (ii) the area where the person displaced lawfully resided and the destination to which the person was displaced; and (iii) the intent of the perpetrator to deport or forcibly transfer the victim.

Unlawful character of displacement

The displacement of persons is illegal where it is forced²⁹ and “when it occurs without grounds permitted under international

²⁴ The Tribunal considered acts of interrogation committed in conjunction with other acts, such as beatings, as torture (*Krnjelac* Trial Judgement, paras. 179, 181 and 185; *Naletilic* Trial Judgement, paras. 368-369), inhuman treatment (*Aleksovski*, IT-95-14/1-T, Judgement (“*Aleksovski* Trial Judgement”), 25 June 1999, para. 210, *Judicial Supplement* No. 6), cruel treatment (*Krnjelac* Trial Judgement, paras. 179, 181 and 185; *Naletilic* Trial Judgement, paras. 368-369), wilfully causing great suffering (*Aleksovski* Trial Judgement, para. 210; *Krnjelac* Trial Judgement, paras. 179, 181, 185; *Naletilic* Trial Judgement, paras. 368-369), and outrages upon personal dignity (*Aleksovski* Trial Judgement, para. 210).

²⁵ Judgement, para. 68.

²⁶ *Ibid.*, para. 69.

²⁷ *Naletilic* Trial Judgement, para. 670; *Krnjelac* Trial Judgement, para. 474, 476; *Krstic*, IT-98-33-T, Judgement (“*Krstic* Trial Judgement”), 2 August 2001, paras. 521, 531 and 532, *Judicial Supplement* No. 27. In *Stakic*, the Trial Chamber held that deportation pursuant to “Article 5(d) of the Statute must be read to encompass forced population displacements both across internationally recognized borders and *de facto* boundaries, such as constantly changing frontlines, which are not internationally recognized” and defined deportation “as the forced displacement of persons by expulsion or other coercive acts for reasons not permitted under international law from an area in which they are lawfully present to an area under the control of another party” (*Stakic* Trial Judgement, para. 679). See also *Krnjelac*, IT-97-25-A, Judgement (“*Krnjelac* Appeal Judgement”), 17 September 2003, Separate Opinion of Judge Schomburg, para. 15, present issue of the *Judicial Supplement*.

²⁸ *Krnjelac* Trial Judgement, paras. 474. The *Krstic* Trial Judgement, at its paragraph 521, defines both deportation and forcible transfer as “the involuntary and unlawful evacuation of individuals from the territory in which they reside”. See footnote 214 of the Judgement.

²⁹ *Naletilic* Trial Judgement, para. 519; *Krstic* Trial Judgement, para. 528.



law”.³⁰ The question before the Trial Chamber in the present case was whether the adoption and implementation of agreements for “exchanges”³¹ supervised by the International Committee of the Red Cross (“ICRC”) and the presence of members of international organisations (ICRC, UNPROFOR³²) may have an impact on the voluntary nature and the lawfulness of a person’s displacement.

In the *Naletilic* Trial Judgement, the Trial Chamber found that “an agreement between two military commanders or other representatives of the parties in a conflict does not have any implications on the circumstances under which a transfer is lawful” as it found that “[m]ilitary commanders or political leaders cannot consent on behalf of the individual” (para. 523). In the *Stakic* Trial Judgement, the Trial Chamber stated that “with regard to a [...] legal evaluation of the behaviour of a warring party, assistance by humanitarian agencies is not a factor rendering a displacement lawful” (para. 673).

The Trial Chamber found that “the adoption of similar agreements, such as those concluded under the auspices of the ICRC in the present case, as well as the presence of ICRC or UNPROFOR members, has no impact on whether the persons’ displacement was voluntary”.³³ It held that “what matters is the *personal* consent or wish of an individual, as opposed to collective consent as a group, or a consent expressed by official authorities, in relation to an individual person, or a group of persons”.³⁴

Destination following displacement

Deportation and forcible transfer both involve the displacement of persons from one location to another. While it has been held that, for deportation, the displacement has to be across a national border,³⁵ the Trial Chamber considered that in the case of a forcible transfer, the destination of the displacement is unclear. It noted that, for forcible transfer, some definitions refer to displacement from the area or territory where the persons reside to a place that is not of their choosing.³⁶ In its view, the right of the victim to stay in his or her home and community and the right not to be deprived of his or her property are among the legal values protected by the prohibition on deportation and forcible transfer.³⁷ It concluded that “the location to which the victim is forcibly displaced is sufficiently distant if the victim is prevented from effectively exercising these rights”.³⁸

Intent of the perpetrator

The question as to whether the intent to deport or forcibly transfer a person requires an element of permanency has not been

extensively dealt with in the Tribunal’s case law. In the *Naletilic* Trial Judgement, the Trial Chamber inferred from the Commentary to Geneva Convention IV³⁹ that “deportation and forcible transfer are not by their nature provisional, which implies an intent that the transferred persons should not return”.⁴⁰ It held that the Prosecution “needs to prove the intent to have the person (or persons) removed, which implies the aim that the person is not returning”.⁴¹

In the *Krnjelac* Appeals Judgement, the Appeals Chamber found that the “forced character of displacement and the forced *uprooting* of the inhabitants of a territory entail the criminal responsibility of the perpetrator, not the destination to which these inhabitants are sent”.⁴² In view of the Trial Chamber, the Appeals Chamber’s use of the word “uprooting” clearly indicates that “the *mens rea* of a forcible displacement comprises the intent of the perpetrator that the victim is not returning”.⁴³ It held: “a finding of forced displacement, either as deportation or forcible transfer, requires an element of permanency in relation to the intention of the accused”.⁴⁴

The Trial Chamber then made it clear that “whether persons forcibly displaced [are] able to return to their former place of residence at a later time has no bearing on the assessment of the legality of the original displacement”.⁴⁵ It added that “the duration of the displacement has no impact on its illegality” as otherwise the perpetrator who had the intent to displace permanently the victim would “unjustifiably benefit from such return”.⁴⁶

³⁰ Article 49 of Geneva Convention IV explicitly allows the “total or partial evacuation of a given area if the *security* of the population or imperative military reasons so demand”. However, “persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased” (*Krnjelac* Trial Judgement, para. 475, footnote 1436, also mentioning Article 17 of Additional Protocol II. Article 17(2) states that “civilians cannot be compelled to leave their own territory for reasons connected with the conflict.” According to these provisions, the forced relocation of persons for their safety or for imperative military reasons may be lawful. The substance of these requirements has been found to be applicable to deportation or forcible transfer pursuant to Article 5(h) of the Statute, forcible transfer pursuant to Article 5(i) of the Statute and deportation pursuant to Article 5(d) of the Statute (*Krstic* Trial Judgement, paras 524-526). The Trial Chamber found that “in view of the drastic nature of a forced displacement of persons, recourse to such measures would only be lawful in the gravest of circumstances and only as measures of last resort” (footnote 218 of the Judgement).

³¹ The term “exchanges” characterises a situation in which, pursuant to an agreement concluded between national and/or international organisations or authorities, a person leaves an area and, reciprocally, another person comes to the area that the former person is leaving (footnote 225 of the Judgement).

³² United Nations Protection Forces.

³³ Judgement, para. 127.

³⁴ *Ibid.*, para. 128. Emphasis added by the Trial Chamber.

³⁵ See footnote 27.

³⁶ See for example the *Naletilic* Trial Judgement, para. 519.

³⁷ In the *Stakic* Trial Judgement, the Trial Chamber held: “The protected interests behind the prohibition of deportation are the right and expectation of individuals to be able to remain in their homes and communities without interference by an aggressor, whether from the same or another State” (para. 677).

³⁸ Judgement, para. 130.

³⁹ Commentary, Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War (1949), International Committee of the Red Cross, Geneva, 1960, page 280. It states: “[unlike] deportation and forcible transfer, evacuation is a provisional measure”.

⁴⁰ *Naletilic* Trial Chamber Judgement, footnote 1362.

⁴¹ *Naletilic* Trial Judgement, para. 520.

⁴² *Krnjelac* Appeals Judgement, para. 218 (emphasis by the Trial Chamber).

⁴³ Judgement, para. 133. In paragraph 16 of his Separation Opinion to the *Krnjelac* Appeals Judgement, Judge Schomburg found that the “*mens rea* for deportation is the intent to remove the victim, which implies the intention that the victim can or will not return”.

⁴⁴ Judgement, para. 134.

⁴⁵ *Ibid.* In the *Stakic* Trial Judgement, the Trial Chamber held: “[i]f a victim were to return, this would consequently not have an impact on the criminal responsibility of the perpetrator who removed the victim” (para. 687).

Separate and Partly Dissenting Opinion of Judge Per-Johan Lindholm

In his Separate and Partly Dissenting Opinion, Judge Per-Johan Lindholm *inter alia* dissociated himself from the concept of joint criminal enterprise, held that Miroslav Tadic should have been found not guilty on Counts 1 and 2, and stated that Simo Zaric should have been found not guilty of Count 1.

Joint Criminal Enterprise

Judge Per-Johan Lindholm dissociated himself from the concept of joint criminal enterprise both in this case and in general. In his view, the “so-called basic form of joint criminal enterprise does not [...] have any substance of its own” and is nothing more than a “new label” affixed to a concept or doctrine well-established in most jurisdictions as well as in international criminal law, namely co-perpetration (para. 2). He gave his reasons for his dissociation and concluded that “the concept or ‘doctrine’ has caused confusion and a waste of time, and is [...] of no benefit to the work or the development of international criminal law” (para. 5).

Liability of Miroslav Tadic

Judge Per-Johan Lindholm undertook a review of the Tribunal’s case law on duress⁴⁷ and adopted the requirements of duress stated by the United Nations War Crimes Commission (“UNWCC”):

- “(i) the act charged was done to avoid an immediate danger both serious and irreparable;
- (ii) there was no adequate means of escape;
- (iii) the remedy was not disproportionate to the evil”.⁴⁸

In his view, Miroslav Tadic’s participation in the deportation of non-Serbs, especially those held in the detention facilities, was aimed at sparing them the persecutory acts they were exposed to in the municipality of Bosanski Samac. He found that the exchanges, arranged with the Red Cross, were the “only possibility of getting safely through the battle lines surrounding Bosanski Samac, and there was no other adequate means of escaping the horrors of the detention facilities in Bosanski Samac than by exchange” (para. 22). Further, he was convinced that Tadic’s participation in the deportation was “not disproportionate to the evil avoided” (para. 23) and that he should therefore have been found not guilty in respect of Counts 1 and 2 (para. 28).

Liability of Simo Zaric

Judge Per-Johan Lindholm found that the Prosecution had failed to prove its case against Simo Zaric beyond reasonable doubt and that he should therefore have been found not guilty in respect of Count 1. In his view, Zaric’s presence and conduct during the interrogations at the SUP (Secretariat of Interior) did not have any effect on the perpetration of the persecutions committed by means of cruel and inhumane treatments (paras. 29-34). ■

⁴⁶ Judgement, para. 134.

⁴⁷ On the notion of duress, see *Erdemovic*, IT-96-22-A, Judgement, 7 October 1997, in which the majority of the Appeals Chamber found that duress does not afford a complete defence to a soldier charged with a crime against humanity and/or a war crime involving the killing of innocent human beings. Duress can only be accepted as a mitigating factor. See *Erdemovic*, IT-96-22-Tbis, Sentencing Judgement, 5 March 1998.

⁴⁸ These features of duress were laid down by the UNWCC following a review of 2,000 decisions issued by the post-World War two international military tribunals (reproduced in the 1996 Report of the International Law Commission, Supplement No. 10, A/51/10, p. 93). This review showed the military tribunals had accepted duress as a defence for violations of international humanitarian law. See *Erdemovic*, IT-96-22-T, Sentencing Judgement, 29 November 1996.

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